

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LLOIS B. COPELAN, a single  
individual,  
  
Plaintiff,

NO. CV-06-0303-LRS

-vs-

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

FERRY COUNTY, a County in the  
State of Washington, PETE WARNER  
and JANE DOE WARNER,  
individually and the marital  
community composed thereof,  
DEANNA DEVAUL, and JOHN DOE  
DEVAUL, individually and the  
marital community composed  
thereof, BUD KNOWLES and JANE  
DOE KNOWLES, individually and  
the marital community composed  
thereof, and JOHN DOES I-X,  
  
Defendants.

Before the Court are Defendant Ferry County, Pete and Jane Doe Warner's [County Defendants] Motion for Summary Judgment, Ct. Rec. 45, filed November 26, 2007; and County Defendants' Motion to Strike, Ct. Rec. 73, filed January 8, 2008. These motions are noted without oral argument.

**I. BRIEF BACKGROUND**

Plaintiff served a Complaint for Damages on Defendants in Okanogan County Superior Court on October 6, 2006. The Complaint raises tort

1 claims related to allegations of improper impoundment of Plaintiff's  
2 cattle under Washington State Open Range Laws, RCW Ch. 16.04 and 16.24.  
3 The remaining claim arises under 42 U.S.C. §1983.

4 On November 1, 2006, Defendants filed a notice of removal to federal  
5 court on the ground that the Complaint included both state law claims and  
6 a claim under 42 U.S.C. § 1983. Ct. Rec. 1. Plaintiff's original  
7 counsel objected to the removal on the grounds that this case was  
8 predominantly grounded in state law tort and the Washington State Open  
9 Range laws which, Plaintiff argued, state courts are better equipped to  
10 handle. The Court, however, denied Plaintiff's motion to remand to  
11 Okanogan County Superior Court on December 8, 2006. On September 26,  
12 2007, the Court granted Plaintiff's original counsel's motion to  
13 withdraw. Current counsel took over Plaintiff's case on November 9,  
14 2007.

## 15 II. DISCUSSION

### 16 A. Legal Standards and Analysis

#### 17 1. Summary Judgment

18 The purpose of summary judgment is to avoid unnecessary trials when  
19 there is no dispute as to the facts before the court. *Zweig v. Hearst*  
20 *Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied.*, 423 U.S. 1025 (1975).  
21 Under Fed. R. Civ. P. 56, a party is entitled to summary judgment where  
22 the documentary evidence produced by the parties permits only one  
23 conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 (1986);  
24 *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985). Summary judgment is  
25 precluded if there exists a genuine dispute over a fact that might affect  
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1 the outcome of the suit under the governing law. *Anderson*, 477 U.S. at  
2 248.

3 The moving party has the initial burden to prove that no genuine  
4 issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith*  
5 *Radio Corp.*, 475 U.S. 574, 586 (1986). Once the moving party has carried  
6 its burden under Rule 56, "its opponent must do more than simply show  
7 that there are some metaphysical doubt as the material facts." *Id.* The  
8 party opposing summary judgment must go beyond the pleadings to designate  
9 specific facts establishing a genuine issue for trial. *Celotex Corp. v.*  
10 *Catrett*, 477 U.S. 317, 325 (1986).

11 In ruling on a motion for summary judgment, all inferences drawn  
12 from the underlying facts must be viewed in the light most favorable to  
13 the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary  
14 judgment is required against a party who fails to make a showing  
15 sufficient to establish an essential element of a claim, even if there  
16 are genuine disputes regarding other elements of the claim. *Celotex*, 477  
17 U.S. at 322-23.

18 **2. 42 U.S.C. § 1983**

19 To state a claim under 42 U.S.C. § 1983, at least two elements must  
20 be met: (1) the defendant must be a person acting under color of state  
21 law, (2) and his conduct must have deprived the plaintiff of rights,  
22 privileges or immunities secured by the constitution or laws of the  
23 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Implicit  
24 in the second element is a third element of causation. *See Mt. Healthy*  
25 *City School Dist. v. Doyle*, 429 U.S. 274, 286-87, (1977); *Flores v.*  
26 *Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*, 449 U.S.

1 975 (1980). When a plaintiff fails to allege or establish one of the  
2 three elements, his complaint must be dismissed.

3 **a. Qualified Immunity**

4 Defendant Warner contends the doctrine of qualified immunity shields  
5 him from Plaintiff's § 1983 claim. Qualified immunity shields government  
6 officials "from liability for civil damages insofar as their conduct does  
7 not violate clearly established statutory or constitutional rights of  
8 which a reasonable person would have known." *Harlow v. Fitzgerald*, 457  
9 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity  
10 protects "all but the plainly incompetent or those who knowingly violated  
11 the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d  
12 271 (1986). "Where an official could be expected to know that certain  
13 conduct would violate statutory or constitutional rights, [the official]  
14 should be made to hesitate...." *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727.  
15 However, where an official acts in an area where "clearly established  
16 rights are not implicated, the public interest may be better served by  
17 action taken 'with independence and without fear of consequences.'" *Id.*

18 In *Saucier v. Katz*, *supra*, the Supreme Court clarified the several  
19 stage process for determining whether the qualified immunity defense  
20 applies. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272  
21 (2001). First, the Court is to decide whether taken in the light most  
22 favorable to the party asserting the injury, the facts alleged show the  
23 officer's conduct violated a constitutional right. *Id.* If Plaintiff fails  
24 to conclusively establish a constitutional violation, the inquiry ends  
25 and the state actors are immune from suit.

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1       Next, the Court must proceed to determine whether the constitutional  
2 right in question was "clearly established" such that "it would be clear  
3 to a reasonable officer that his conduct was unlawful in the situation  
4 he confronted." *Id.* at 201-02, 121 S.Ct. 2151. If the right is not  
5 clearly established, the individual public officials are entitled to  
6 qualified immunity if a reasonable official could have believed that his  
7 or her conduct was lawful. *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir.  
8 1997). To be clearly established, the law must be "sufficiently clear  
9 that a reasonable official would understand that what he is doing  
10 violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107  
11 S.Ct. 3034, 97 L.Ed.2d 523 (1987)); see also *Groh v. Ramirez*, 540 U.S.  
12 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

13       Once these requirements are found to have been satisfied, the  
14 inquiry proceeds to another, closely related issue, that is, whether the  
15 officer made a reasonable mistake as to what the law requires. *Saucier*  
16 emphasized that the inquiry for qualified immunity eligibility is  
17 distinct from establishment of a constitutional violation. As the Court  
18 explained, "[t]he concern of the immunity inquiry is to acknowledge that  
19 reasonable mistakes can be made as to the legal constraints on particular  
20 police conduct...[i]f the officer's mistake as to what the law requires  
21 is reasonable, however, the officer is entitled to the immunity defense."  
22 *Saucier*, 533 U.S. at 205, 121 S.Ct. 2151.

23       "[W]hether an official protected by qualified immunity may be held  
24 personally liable for allegedly unlawful official action generally turns  
25 on the 'objective legal reasonableness' of the action." *Anderson v.*  
26 *Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523

1 (1987)(quoting Harlow, 457 U.S. at 819, 102 S.Ct. 2727); *Bingham v. City*  
2 *of Manhattan Beach*, 341 F.3d 939, 950 (9th Cir. 2003). "Even law  
3 enforcement officials who 'reasonably but mistakenly conclude that  
4 probable cause is present' are entitled to immunity." *Hunter*, 502 U.S.  
5 at 227, 112 S.Ct. 534; *Bingham*, 341 F.3d at 950. After a defendant  
6 properly raises qualified immunity in his or her defense at the summary  
7 judgment stage, the burden is on the plaintiff to produce evidence  
8 sufficient to create a genuine issue of material fact whether defendant  
9 engaged in conduct alleged to have violated a clearly established right.

10 Defendants argue that Defendant Warner is entitled to qualified  
11 immunity because Plaintiff cannot establish that she was deprived of any  
12 constitutional right. Defendants assert that Defendant Warner's actions  
13 consisted of arranging for the impound of trespassing livestock pursuant  
14 to chapters 16.04 and 16.24 RCW. His actions, Defendants suggest, were  
15 lawful and as such, cannot be found to have "violated clearly established  
16 law."

17 Plaintiff responds that Defendant Warner (and the Brand Inspector  
18 Vickie Davis, who is not a named defendant) failed to make threshold  
19 determinations that are a prerequisite to impounding livestock pursuant  
20 to chapter 16.24 RCW. Plaintiff argues that there was "a total and  
21 complete lack of any investigation or inquiry by the Ferry County  
22 Sheriff's Office." Interestingly, however, Plaintiff does not dispute  
23 that Sheriff Warner read the Open Range RCWs prior to ordering the  
24 impound and invested at least 35 minutes investigating the allegations  
25 prior to ordering impound. Plaintiff also states that Defendant Warner  
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1 has admitted wrongdoing.<sup>1</sup> Plaintiff concludes that the alleged unlawful  
2 impoundment of Plaintiff's cattle from the Open Range cannot be justified  
3 under the statute.

4 The Court agrees with County Defendants. The Court finds that even  
5 if Defendant Warner did violate Plaintiff's constitutional rights related  
6 to deprivation of her property and/or due process, Defendant Warner is  
7 entitled to qualified immunity. Although it can be argued that Defendant  
8 Warner misinterpreted the applicable statutes, he is still entitled to  
9 qualified immunity because the statutes and case law did not "clearly  
10 establish" that his interpretation was incorrect.

11 RCW 16.04.025 requires that the property owner contact a county  
12 sheriff or state brand inspector, who in turn is to examine the animals  
13 in an attempt to determine ownership. It appears that Defendant Warner  
14 did not make a visit to the property to examine the animals for  
15 identifying characteristics in an attempt to ascertain ownership. RCW  
16 16.04.025 reads:

17 **16.04.025. Owner of animals unknown--Procedure**

18 If the owner or the person having in charge or  
19 possession such animals is unknown to the person  
20 sustaining the damage, the person retaining such animals  
21 shall, within twenty-four hours, notify the county  
22 sheriff or the nearest state brand inspector as to the  
23 number, description, and location of the animals. The  
county sheriff or brand inspector shall examine the  
animals by brand, tattoo, or other identifying  
characteristics and attempt to ascertain ownership. If  
the animal is marked with a brand or tattoo which is

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24 <sup>1</sup>It appears Defendant Warner simply suggested at his deposition  
25 that he could have put more effort towards investigation prior to  
26 requesting that the cattle hauler contact Ms. Devaul. Plaintiff's  
characterization that Defendant Warner admitted to wrongdoing is  
misleading as the standard for qualified immunity is not based on whether  
he could have done more, based on hindsight reflection.

1 registered with the director of agriculture, the brand  
2 inspector or county sheriff shall furnish this  
3 information and other pertinent information to the  
4 person holding the animals who in turn shall send the  
5 notice required in RCW 16.04.020 to the animals' owner  
6 of record by certified mail.

7 If the county sheriff or the brand inspector determines  
8 that there is no apparent damage to the property of the  
9 person retaining the animals, or if the person  
10 sustaining the damage contacts the county sheriff or  
11 brand inspector to have the animals removed from his or  
12 her property, such animals shall be removed in  
13 accordance with chapter 16.24 RCW. Such removal shall  
14 not prejudice the property owner's ability to recover  
15 damages through civil suit.

16 Based on the undisputed facts, and regardless of any misinterpretation  
17 of his duties under the statute, Defendant Warner is entitled to  
18 qualified immunity. This is so because governmental immunity applies to  
19 situations where state officials misinterpret the law but demonstrate  
20 that they acted objectively reasonable under the *Harlow v. Fitzgerald*,  
21 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) standard adopted  
22 by the Supreme Court.

23 To show that the law is "clearly established" under qualified  
24 immunity analysis, it is not enough to assert the violation of a broad  
25 or abstract right. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct.  
26 3034, 3038, 97 L.Ed.2d 523 (1987). Rather, in the "particularized"  
context of the case, "[t]he contours of the right must be sufficiently  
clear that a reasonable official would understand that what he is doing  
violates that right." *Id.* at 640, 107 S.Ct. at 3039. *Anderson* requires  
an "objective (albeit fact-specific)" analysis "in light of clearly  
established law and the information the ... officers possessed." 483  
U.S. at 641, 107 S.Ct. at 3040. The undisputed facts indicated the

1 Defendant Warner was notified on August 1, 2003 by the Ferry County  
2 dispatcher that Defendant Deanna Devaul had called the Sheriff's Office  
3 concerning some cattle that were currently penned in her corral/pasture.  
4 According to Ms. Devaul, the cattle trespassed on her property by pushing  
5 through a gate into her pasture. Ms. Devaul stated that the cattle  
6 subsequently destroyed a water tank, damaged her barn and a standpipe,  
7 and ate a significant amount of hay. Ms. Devaul requested help from the  
8 Sheriff's department to remove the trespassing cattle.

9 The undisputed facts indicate that after reading the report  
10 resulting from Ms. Devaul's call to the Sheriff's Office dispatcher,  
11 Defendant Warner attempted to have a local livestock hauler contact Ms.  
12 Devaul, as he understood his duties according to chapters 16.04 and 16.24  
13 RCW. It is undisputed that he did consult the statutes and that was his  
14 interpretation of the statutes at that time. On August 3, 2003,  
15 Defendant Bud Knowles loaded thirteen head of cattle from Ms. Devaul's  
16 pasture into his truck and transported them to Stockland livestock yard  
17 in Davenport, Washington. At the livestock yard, a Washington State  
18 brand inspector identified the cattle as belonging to Plaintiff and  
19 contacted her to retrieve her cattle. Plaintiff subsequently retrieved  
20 her cattle that same day.

21 "The qualified immunity standard 'gives ample room for mistaken  
22 judgments' by protecting 'all but the plainly incompetent or those who  
23 knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991);  
24 *Malley v. Briggs*, *supra*. This accommodation for reasonable error exists  
25 because "officials should not err always on the side of caution" because  
26 they fear being sued. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

1 Defendant Warner is entitled to immunity if a reasonable sheriff could  
2 have believed that he had proper authority to impound the cattle. A  
3 reasonable sheriff could reasonably believe that authority existed, as  
4 did Defendant Warner, under RCW 16.24.110, which reads:

5 16.24.110. Public nuisance--Impounding  
6 Any horses, mules, donkeys, or cattle of any age running  
7 at large or trespassing in violation of chapter 16.24  
8 RCW as now or hereafter amended, which are not  
9 restrained as provided by RCW 16.04.010, are declared to  
be a public nuisance. The sheriff of the county where  
found and the nearest brand inspector shall have  
authority to impound such animals which are not  
restrained as provided by RCW 16.04.010.

10 This statute makes it clear that even on open range, cattle owners cannot  
11 allow their cattle to run at large and become public nuisances. It is  
12 undisputed that Defendant Warner believed such was the case after  
13 reviewing Defendant Devaul's call to the Sheriff's Office.

14 Qualified immunity ordinarily should be decided by the court long  
15 before trial. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). After  
16 a thorough review of the undisputed facts, it is the Court's conclusion  
17 that Defendant Warner is entitled to qualified immunity regardless of  
18 whether he violated a constitutional right.<sup>2</sup> There is no law which  
19 "clearly establishes" that Defendant Warner's actions were prohibited  
20 under the undisputed facts of this case. Thus, Plaintiff's 42 U.S.C.  
21 §1983 claim against Defendant Warner is dismissed.

#### 22 ***b. Municipal Liability***

23 In addition to suing the named individual County employee, Plaintiff  
24 has sued the County for deprivation of her property under the color of  
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26 <sup>2</sup>The Court does not find that Plaintiff's constitutional rights were  
violated by County Defendants.

1 law. Complaint, at ¶ 5.3. Municipalities are "persons" subject to suit  
2 under 42 U.S.C. § 1983. See *Monell v. New York City Dept. of Social*  
3 *Serv.*, 436 U.S. 658, 691 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).  
4 However, municipalities cannot be held liable pursuant to §1983 under a  
5 traditional respondeat superior theory. Rather, they may be held liable  
6 only when "action pursuant to official municipal policy of some nature  
7 caused a constitutional tort." *Id.* at 691, 98 S.Ct. 2018. Plaintiff has  
8 not alleged and has not argued any program-wide inadequacy of training  
9 or supervision under *Alexander v. City and County of San Francisco*, 29  
10 F.3d 1355, 1367 (9<sup>th</sup> Cir.1994). Thus the Defendant County may not be held  
11 liable under § 1983 based on Plaintiff's theory of the case. Plaintiff's  
12 42 U.S.C. §1983 claim against Defendant Ferry County is dismissed.

### 13 **3. Supplemental Jurisdiction Over State Claims**

14 All that remains in this case as to the County Defendants or other  
15 named Defendants, having dismissed Plaintiff's claims for violations of  
16 42 U.S.C. § 1983, are state law tort claims (negligence, conversion, and  
17 trespass to chattels) and a fifth cause of action<sup>3</sup> not recognized in the  
18 State of Washington.

19 "[I]n the usual case in which federal-law claims are eliminated  
20 before trial, the balance of factors... points toward declining to  
21 exercise jurisdiction over the remaining state-law claims." *Imagineering,*  
22 *Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1002) (quoting  
23 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). Under 28  
24 U.S.C. § 1367(c)(3), a district court "may decline to exercise  
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26 <sup>3</sup>Plaintiff alleges as her fifth cause of action "failure to arrive  
at a solution."

1 supplemental jurisdiction over a claim...if...the district court has  
2 dismissed all claims over which it has original jurisdiction." The Court,  
3 having dismissed plaintiff's federal claim, declines to exercise  
4 supplemental jurisdiction over any remaining state law claims against any  
5 of the Defendants named in this lawsuit.

#### 6 **4. Motion to Strike**

7 County Defendants move to strike all documents that are alleged to  
8 have not been properly authenticated pursuant to Fed.R.Civ.P. 56(e) and  
9 FRE 901 for purposes of this summary judgment motion. County Defendants  
10 further request that the Court strike the inadmissible testimony from  
11 Plaintiff Copelan's declaration pursuant to FRE 802 and FRE 901. The  
12 Court acknowledges that only admissible evidence may be considered on  
13 summary judgment. Only the documents, or portions thereof, that contain  
14 admissible evidence have been considered by the Court for purposes of  
15 this summary judgment motion. Declarations are admissible only if  
16 relevant and based upon personal knowledge. Conclusory facts cannot be  
17 utilized on summary judgment. Fed.R.Civ.P. 56(e). The Court so  
18 acknowledges and has considered only admissible evidence. The Court  
19 grants the County Defendants motion to strike.

#### 20 **III. CONCLUSION**

21 The Court finds that Defendant Warner reasonably inferred from known  
22 circumstances that Plaintiff's cattle were running at large and becoming  
23 public nuisances on private land. The Court finds that Defendant Warner  
24 also reasonably inferred from the circumstances that he to had proper  
25 authority to impound the cattle. Further, the Court finds that Plaintiff  
26 has failed to establish the existence of any unconstitutional policy or

1 custom within the Defendant County that caused an alleged constitutional  
2 deprivation. Even if Defendant Warner was mistaken in his judgment,  
3 qualified immunity still protects him under the circumstances of this  
4 case. As a matter of law, Warner acted objectively reasonable with  
5 respect to his role in the impoundment of Plaintiff's 13 cattle.  
6 Accordingly,

7 **IT IS ORDERED** that:

8 1. Defendant Ferry County, Pete and Jane Doe Warner's Motion for  
9 Summary Judgment, **Ct. Rec. 45**, filed November 26, 2007 is **GRANTED**.  
10 Plaintiff's 42 U.S.C. §1983 claims against Defendant Ferry County and  
11 Defendants Pete and Jane Doe Warner are **DISMISSED WITH PREJUDICE**. The  
12 remaining state law claims are **DISMISSED WITHOUT PREJUDICE**.

13 2. The County Defendants' Motion to Strike, **Ct. Rec. 73**, filed  
14 January 8, 2008 is **GRANTED**.

15 The District Court Executive is directed to enter this Order, enter  
16 judgment accordingly, provide a copy to counsel, *pro se* defendants, and  
17 **CLOSE THIS FILE**.

18 **DATED** this 16th day of January, 2008.

19  
20 **s/Lonny** R. Suko

21 \_\_\_\_\_  
22 LONNY R. SUKO  
23 UNITED STATES DISTRICT JUDGE  
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